

CANADA / JUDGMENT

R. v. Plehanov

2020 BCCA 249

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 249 R. v. Plehanov

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Plehanov,

2020 BCCA 249

Date: 20200918

Docket: CA44868

Between:

Regina

Respondent

And

Aleksandr Plehanov

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials X. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraph 52 on September 22, 2020.

Before:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated October 31, 2017 (R. v. Plehanov, 2017 BCSC 2176, New Westminster Docket X077990).

Counsel for the Appellant, appearing via videoconference:

M. Reinhart

Counsel for the Respondent, appearing via videoconference:

S. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

August 20, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 18, 2020

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

Summary:

The appellant seeks to appeal his sentence and also applies to adduce fresh evidence. The appellant was convicted of sexually assaulting a six-year-old girl and sentenced to six months' imprisonment along with two years' probation. The appellant argues that his case was one for which a suspended sentence would have been appropriate, and seeks a reduction to time served. He alleges the sentencing judge made six errors in principle that had an impact on the six month sentence imposed. Held: Application to adduce fresh evidence dismissed except the portion dealing with the appellant's pre-sentence time served; leave to appeal is granted and the appeal is allowed, but only to the extent of reducing the sentence by 4 days to give credit for that pre-sentence time. The appellant has not identified any errors in principle that were material and he does not argue his sentence was demonstrably unfit. Had the pre-sentence time served been brought to the sentencing judge's attention, it is probable he would have allowed credit for it.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1.0 INTRODUCTION

- [1] On January 8, 2016, the appellant was convicted of the sexual assault of a six-year-old girl (referred to in these reasons as "X"), contrary to section 271 of the Criminal Code. He was acquitted of the companion charge of sexual interference contrary to section 151. In reasons for judgment indexed at 2016 BCSC 322, Mr. Justice Blok found that, while the appellant's touching of X was objectively sexual in nature, establishing sexual assault, he noted that section 151 was a specific intent offence, and he was not satisfied beyond a reasonable doubt that the Crown had proven that the appellant touched X for a sexual purpose.
- [2] By the time of his sentencing hearing in September 2017, the then-mandatory minimum sentence of imprisonment for one year had been declared to be of no force and effect: *R v ERDR*, 2016 BCSC 684.
- [3] In the result, on October 31, 2017, Blok J sentenced the appellant to six months' imprisonment, and imposed a probation order lasting 24 months. His oral reasons for judgment are indexed at 2017 BCSC 2176.
- [4] The appellant appealed his conviction, and that appeal was dismissed: 2019 BCCA 462.
- [5] The appellant now seeks leave to appeal his sentence, arguing that the appropriate sentence would be a suspended sentence, or time served (he served two months of his sentence before being released on bail pending his appeals; this is said to be the equivalent of a sentence of three months' imprisonment less four days). He also applies for leave to adduce fresh evidence.

2.0 GROUNDS OF APPEAL

- [6] In his proposed appeal, the appellant does not contend that the sentence was demonstrably unfit. Rather, he alleges six errors in principle:
1. in assessing the psychiatric reports and in treating the appellant's continued claims of innocence as an aggravating factor;
 2. in relying on findings of fact on sentencing that had not been proven in the evidence;
 3. in identifying an inappropriate range of sentence;
 4. in finding that the appellant was in a position of trust with respect to X;
 5. in failing to consider collateral consequences, applying the wrong standard of law; and
 6. in failing to account for pre-sentence time in custody (an issue not brought to the judge's attention).
- [7] For the reasons that follow, I would grant leave to appeal, and allow the appeal only to the extent of reducing the sentence by 4 days to account for pre-sentence time in custody.

3.0 THE CIRCUMSTANCES OF THE OFFENCE

- [8] In his reasons for judgment on sentence, the sentencing judge described the circumstances as follows:
- [8] In my earlier reasons for judgment, which may be found at 2016 BCSC 322, I described the context leading up to the offence as follows (and I make the parenthetic note that in those reasons I refer to the six-year-old complainant as "X"):
- [5] The father and his wife have a large family with children ranging in age from toddlers to teenagers. They are long-time, active members of a local church. The church has a type of mentorship program and this is how the father came to know Mr. Plehanov, or at least how he came to know him better, as Mr. Plehanov was already attending services at the church. Through this mentoring relationship, Mr. Plehanov joined the family on three or four outings and visited their home on perhaps five occasions.
- [7] The events in question took place on March 31, 2013, which was Easter Sunday. The family attended a church service in the morning and in the afternoon they gathered at the father's parents' house in Surrey for what is their traditional Easter gathering. I will refer to this residence as the Grandparents' home. Mr. Plehanov attended that family gathering. Earlier, he parked his car at the family's home and he then travelled to the Grandparents' home in the family's 15-passenger van. X's mother, that is, the father's wife, did not attend. She stayed home with their young infant child. The family gathering was an event for extended family, and the father's siblings, their spouses and their children attended. The adults socialized and the children played or did other activities together. The event lasted from mid-afternoon until late in the evening.

- [8] The father testified that these family gatherings tend to run later than his family prefers and they often leave earlier than other family members. This can create a challenge in getting their own children to leave, because events involving the children are still going on.
- [9] The father said that he started the process of leaving around 9:00 p.m. His children -- that is, those children who attended -- at that time ranged from ages three to 12 so he focused on getting the three youngest ones out first, leaving the several older ones watching television with their relatives. He asked the adults who were present to send out his older children when the show they were watching ended.
- [10] The father thus had with him X, the six year old girl in question, as well as two younger siblings, who I will refer to as "Y" and "Z". Mr. Plehanov was going to be riding back with them in the family van, so when he saw the father heading out he offered to help carry things out to the van.
- [13] The father had asked his siblings to send out the older children but realized at a certain point that this was not happening and so he was going to have to get them himself. Although he had concerns about leaving Mr. Plehanov with the children, he left Mr. Plehanov to mind them while he went back to the house. When the father left the van, Mr. Plehanov was standing outside the opened hinged doors on the right side of the van.
- [9] When the father went back to the house, X, the six-year-old girl, moved from her seat in the van, but lost her balance in the area of the side door. I pause here to note that she was wearing yoga-type pants and a top. In my earlier reasons, I came to the following conclusions about what happened next:
- [69] From this evidence, I conclude that Mr. Plehanov caught X during a fall and subsequently rubbed X's buttocks over her pants two separate times. I am satisfied, as well, that at some point after catching X, Mr. Plehanov's fingers were hooked into the front area of her pants, his fingers were touching the area above X's groin and his palm was touching her groin over her pants. I accept X's evidence that the touching occurred after the near-fall, in that X's evidence was that the touching associated with the hooking of the fingers did not occur as Mr. Plehanov caught her, but instead occurred subsequently.
- [70] The father's evidence, which I accept, helps to establish the overall duration of the events. His first observations, from the sundeck of the Grandparents' home, were of Mr. Plehanov and X standing facing each other and in close proximity. He watched from the sundeck for perhaps 20 seconds, and then bolted to the van. At the van, he observed two incidents of bum-rubbing, lasting three to five seconds each, over a period of time lasting between 30 and 60 seconds.
- [71] On this point, I note that the defence characterized the events in question as being all part of "one transaction", that being X's loss of balance and an associated rescue by Mr. Plehanov. The evidence does not support that characterization. First of all, X said that Mr. Plehanov caught her at the hips and then moved to what she called her "bum" and her "bottom".

Second, according to X the touching occurred over a 20-second period, timed at 12 to 13 seconds, much longer than seemingly necessary if merely part of catching X and helping her to recover balance. Third, the father's evidence shows that the touching occurred over a relatively long period of time. Mr. Plehanov and X were already in close proximity facing each other when the father first saw them from his vantage point on the sundeck. Twenty seconds elapsed during this period of observation, then more time as the father dashed to the van, then another period of time between 30 and 60 seconds, and Mr. Plehanov was rubbing X's buttocks even then. The duration of the events is too long for the touching to still be associated with Mr. Plehanov catching X from a near-fall.

4.0 THE CIRCUMSTANCES OF THE OFFENDER

- [9] At the time of the offence in 2013, the appellant was 38. He is now 46. The sentencing judge described his circumstances as follows:
- [14] Mr. Plehanov was born and raised in the former Soviet republic of Kyrgyzstan. He seems to have had a relatively normal upbringing. Although his parents separated when he was six and he was then cared for by his mother, he continued to have a relationship with his father.
- [15] He obtained a degree in electrical engineering from a university in Kyrgyzstan, and thereafter obtained employment with the government and then with a Swiss consulting company. He obtained a degree in education in 2002.
- [16] Mr. Plehanov emigrated to Canada that same year. He left Kyrgyzstan because it was unstable. In Canada, he obtained work as a security guard. He worked in that field until 2007. In 2004 and 2005, he took courses to upgrade his education credentials to meet Canadian requirements. In 2009, he obtained a master's degree in education, with a speciality in mathematics. He took further courses in applied science starting in 2011 and obtained a master's degree in that field in 2015. He is now a Canadian citizen.
- [17] From 2007 to 2010, he worked as a teacher on call in the local school district. This employment ceased upon the reports of incidents of inappropriate behaviour, described as "boundary issues", that resulted in criminal charges. He was subsequently acquitted of all charges relating to these events.
- [18] I have mentioned these latter events, even though they resulted in acquittals, because they are relevant to comments made by the experts who assessed Mr. Plehanov for sentencing purposes. I wish to make clear that Mr. Plehanov has no criminal record and, in coming to my sentencing decision today, I am sentencing him as a first-time offender.
- [19] Mr. Plehanov has not had regular employment since 2010. He has been diagnosed with major depression with anxiety and somatization, which I will address more fully later. He is on disability assistance. He supplements that income with income from adult tutoring.

[20] Mr. Plehanov lives with his mother. She is dependent on him generally, but in particular because she does not speak English. She provided a letter of support that I will summarize shortly.

[21] I noted the following items in the pre-sentence report:

- a) he told the probation officer he does not have any friends, that he spends most of his time at home. While he feels lonely at times, he also said he is something of an introvert and tends to keep to himself;
- b) his last romantic relationship ended in 2010; and
- c) he denied having any attraction to children.

[22] The author of the pre-sentence report said the following about remorse and rehabilitation:

The subject did indicate he felt "sorry" for the victim given her required involvement with the trial. However, Alek placed much of the blame for the charges on the father of the victim, indicating the father created a situation in which he could accuse the subject of the sexual assault against his daughter.

The subject has been compliant while under bail supervision for the current matter. He reports largely when directed. Mr. Plehanov advised he does not feel he needs to attend any type of counselling, as he maintained he did not do anything wrong towards the victim. However, the subject conceded [that] he would attend counselling, including the Forensic Sex Offender Program, if the Court deemed it necessary.

[23] Mr. Plehanov's mother provided a letter of support, translated from Russian. She describes her son as highly educated, intelligent, and hard-working. She says he has always been very caring, kind, and trusting. She notes that her son has been diagnosed with severe depression and suffers from anxiety and frequent headaches, among other things. The legal proceedings have been hard on him.

[24] His mother is 69 years old and suffers from various health issues that flare up from time to time. She and her son have no other relatives in Canada. If he is jailed, there will be no one else to take care of her when she is sick. She pleads with the court to allow her son to serve his sentence in the community.

5.0 VICTIM IMPACT

[10] The sentencing judge described the evidence concerning the impact of the offence on the victim, X, as follows:

- [10] X's mother provided a victim impact statement. She said that this offence introduced X to sexual behaviour prematurely and in a negative way. The child had enjoyed Mr. Plehanov's company and she felt betrayed, confused by the ensuing consequences, and she felt guilty about getting him into trouble. The court proceedings caused X anxiety and stress and, because she was a witness, she was unable to talk to her family about it.
- [11] After testifying in court, X expressed fear of the same event happening again with Mr. Plehanov.
- [12] The mother noted that her seven other children have had to process all that has gone on and it has been hard on them too. The mother said it has also been very hard on her. She has had to respond to difficult questions from the children and has had to deal with her own feelings of anger and sadness. This has caused her to have anxiety and difficulties with sleep.
- [13] The mother is concerned how this event will affect X as she approaches puberty. She feels her daughter's innocence has been taken away from her.

6.0 THE SENTENCING JUDGE'S REASONS

- [11] Justice Blok reviewed the presentence report that was filed, as well as the reports of two psychiatrists, Dr. Levin (the appellant's treating psychiatrist) and Dr. Kropp, a forensic psychologist with Forensic Psychiatric Services Commission. He noted that these experts differed on the risk of reoffending (which Dr. Levin assessed at low to very low, while Dr. Kropp assessed the risk as moderate).
- [12] The judge went on to note the position of the Crown in argument that, in the absence of the statutory minimum, the appropriate range was between 3 and 12 months in jail with three years' probation, although the Crown's original submission was that the proper range for the appellant was between 12 and 15 months. The defence contended that the appropriate range began with a conditional discharge or a suspended sentence, and went up to 15 months in jail. Within that range, the defence argued for a non-custodial sentence.
- [13] The judge then proceeded to review the relevant Criminal Code provisions, noting in particular that section 271 established a maximum sentence of 14 years for sexual assault of a person under the age of 16, indicating "the seriousness with which Parliament views these types of offences" (at para 70).
- [14] After reviewing the general sentencing principles and the fundamental purposes of sentencing, Blok J said this:
- [73] Two Criminal Code provisions address the abuse of children. Section 718.01 says that:
- 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

- [74] Section 718.2 of the Code says that if an offender has abused a person under 18 or abused a position of trust or authority, these are deemed to be aggravating circumstances in sentencing.
- [15] The latter provision, which makes abuse of a position of trust or authority a statutory aggravating circumstance, is of relevance to the fourth ground of appeal.
- [16] Justice Blok then went on to review the evidence, his findings, and the parties' submissions:

B. The Offence

- [75] During submissions, counsel for Mr. Plehanov suggested the touching in question was as little as two instances lasting three seconds each and was confined to X's buttock area. In my earlier reasons for judgment, I did not state a definite duration of the touching. Defence counsel's submission is based on the father's evidence only, restricted to the father's observations once he was peering through the back window of the van, and does not take into account X's own testimony. From the evidence, I conclude that the touching lasted longer than that, though it was certainly less than a minute and most probably in the range of 20 to 30 seconds. The touching involved both the groin and the buttock area, though mostly the latter.
- [76] As noted in *R. v. J.L.C.*, 2012 BCSC 623, at para. 30, "the authorities make clear that the sexual abuse of children is an abhorrent socially damaging act which warrants strong condemnation by the courts". In *R. v. Allen*, 2012 BCCA 377, at para. 59, the court said "Parliament has made it very clear that the protection of children is a basic value of Canadian society which the courts must defend."
- [77] All sexual assaults are serious offences. Sexual assaults of children are even more serious. However, within the spectrum of sexual assaults of children, this offence falls at the lesser end.

C. Risk of Reoffending

- [78] As noted earlier, the experts disagreed on Mr. Plehanov's risk of reoffending. The central point of disagreement was whether Mr. Plehanov met the RSVP factor of "extreme minimization or denial".
- [79] I felt Dr. Levin himself minimized the various statements from Mr. Plehanov that plainly demonstrated complete or near-complete minimization and denial. Dr. Levin acknowledged the various minimizing statements reported in Dr. Kropp's report, including Mr. Plehanov's claim that he "did nothing wrong", but insisted that Mr. Plehanov's attitude towards the offence had changed. He did not, however, articulate any real basis for this assertion and did not point to any statements by Mr. Plehanov indicating such a change in attitude. Indeed, he conceded he did not ask Mr. Plehanov directly if he now felt any differently about it. Instead, Dr. Levin used such expressions as Mr. Plehanov "most probably knows" what he has done is

wrong and "I felt he came a long way to accepting it", as well as the conclusory statement, "his attitude has changed".

- [80] Dr. Levin also said that Mr. Plehanov expressed "genuine regret", but I note that this was not regret for the offence, but instead this was focused on the fact that he was sorry the girl had to come to court to testify.
- [81] Dr. Levin agreed there was minimization on Mr. Plehanov's part, but considered it stemmed from Mr. Plehanov's anxiety issues. That is to say, he made a link between Mr. Plehanov's mental disorder and his minimizing of the offence. Yet at the same time, Dr. Levin did not regard "major mental illness" as being present as an additional RSVP factor, instead discounting Mr. Plehanov's diagnosed mental health conditions as being "protective" in nature. I found this to be inconsistent. In any event, I fail to see how the identification of a cause for Mr. Plehanov's minimization makes his minimization of the offence any better.
- [82] I was also not persuaded that Dr. Levin's use of additional population-based assessment tools added to the accuracy of his assessment. Instead, I conclude that those additional tools were essentially unhelpful for the reasons given by Dr. Kropp, reasons with which I agree.
- [83] For these reasons, I consider Dr. Kropp's opinion to be the more accurate and reliable. I therefore conclude that Mr. Plehanov is at moderate risk to reoffend.

D. Aggravating and Mitigating Factors

- [84] The fact that this offence involved a child is a statutorily-mandated aggravating circumstance. The fact that Mr. Plehanov was left to care for X and her brothers while the father fetched the other children means that Mr. Plehanov was in a position of trust to some extent, although this position of trust was limited, both in scope and duration: see *R. v. Lonegren*, 2009 BCSC 1678. This, too, is an aggravating factor.
- [85] Mr. Plehanov has no criminal record. This is a factor in Mr. Plehanov's favour, though I do not consider that it is a mitigating factor so much as it is the absence of an aggravating factor.
- [86] It is convenient to mention under this subject the defence argument that Mr. Plehanov's conviction has had negative collateral effects akin to "humiliation and ruin", a factor mentioned in some sentencing cases. These cases have taken into account the humiliation and ruin that the offender has brought down upon himself, not in mitigation, but instead on the sentencing objectives of denunciation and deterrence, as recognition of the significant price an offender may have already paid for his conduct: see *R. v. Maxmenko*, 2015 BCSC 2224 at paras. 36-37, citing *R. v. Bunn*, 2000 SCC 9 at para. 23.
- [87] The collateral effects in this case, though significant to Mr. Plehanov, are little different than those for any other offender in Mr. Plehanov's situation. They fall far short of "humiliation and ruin". In any event, I agree with the Crown that, leaving aside the publication of his conviction in the community newspaper, a good deal of Mr. Plehanov's social isolation and

impaired employment prospects dates from his earlier issues when employed as a teacher. I conclude that this is not a mitigating factor or a factor that otherwise ought to reduce an otherwise fit sentence.

E. Sentencing Range

- [88] Both Crown and defence cited cases involving a relatively wide range of facts, including cases involving adult victims, offenders who pleaded guilty, offenders with related and recent criminal records, including lengthy records for predatory behaviour, cases where the Crown proceeded summarily, and other cases with facts quite different from those in the present case. No case cited by counsel involved facts directly comparable to those in the present case, but I found the most helpful cases to be O.C.M., C.(C.), M.L., E.M.Q., S.J.P., and E.R.D.R. From my review of all of the cited cases, I am satisfied that the appropriate range of sentence is from three to 12 months' imprisonment.
- [89] Mr. Plehanov argues that a suspended sentence with strict conditions would satisfy the sentencing objectives of denunciation and deterrence, while still meeting the objective of rehabilitation. He notes that suspended sentences have been imposed even in cases of manslaughter: see, for example, the cases cited in *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A.). He refers as well to *R. v. Voong*, 2015 BCCA 285. In that case, the Court of Appeal considered four drug trafficking cases where suspended sentences had been imposed. The court noted (at para. 39) that "a suspended sentence has been found to have a deterrent effect in some cases". Mr. Plehanov argues that, similarly, deterrence can be served in this case through a suspended sentence.
- [90] The Crown concedes that a suspended sentence can serve the sentencing objective of deterrence in an appropriate case, but notes that drug trafficking offences do not have denunciation and deterrence as statutorily-mandated primary considerations. The Crown also notes that Voong reserves suspended sentences for cases involving "exceptional circumstances".
- [91] I agree that the provisions of s. 718.01 of the Criminal Code, which requires that denunciation and deterrence be primary considerations when sentencing offenders who have abused persons under 18 years, makes a suspended sentence less likely to be imposed in these types of cases as compared to drug trafficking cases. In addition, Voong itself requires a case – a drug trafficking case – to have "exceptional circumstances" in order to depart from the usual range of six to 18 months' imprisonment for a first-time offender.
- [92] In *R. v. Tuffs*, 2012 SKCA 6, the court overturned a suspended sentence imposed on an offender who got into the sleeping adult complainant's bed, put his hand down her pants and touched her vagina. The court instead imposed a 12-month jail sentence, saying that "sexual assaults of this nature should draw a period of incarceration" (at para. 10). While that case is not binding on this court, it is nonetheless persuasive. By reason of s. 718.01 of the Code, a suspended sentence must be even more inappropriate in most cases involving the

abuse of a child.

- [93] Though Mr. Plehanov's counsel has said everything that could possibly be said in favour of a suspended sentence in this case, I conclude that it would be inappropriate here, because of the nature of the offence, the fact that it involved the abuse of a child, the fact that there was a limited position of trust between offender and victim, and because there are no exceptional circumstances that would warrant a departure from the custodial sentence that such an offence would usually attract. A custodial sentence is called for in this case.
- [94] The case authorities establish various factors to be taken into account in sentencing in cases involving sexual offences against children. These include the age of the victim, the nature, duration, and frequency of the sexual assaults, whether forced threats or grooming were used, whether the offender was in a position of trust, the criminal record of the offender, the effect on the victim, an early guilty plea sparing a child from testifying, an expression of remorse, the offender's insight into his behaviour, including any treatment taken or attitude toward treatment, and matters of that sort.
- [95] Here, the offence was at the lesser end of the spectrum of this serious type of offence and the event was relatively brief. Mr. Plehanov was in a position of limited trust, but a position of trust nonetheless. The victim was very young and vulnerable, and his insight into and understanding of his offending seems very limited.
- [17] In the result, Blok J imposed a sentence of six months' imprisonment, together with a probation order of 24 months and a number of ancillary orders, the terms of which are not in issue.

7.0 DISCUSSION

7.1 The impact of R v Friesen

- [18] In para 77 of his reasons for judgment, the sentencing judge underlined the seriousness of a sexual assault against a child, concluding, however, that "within the spectrum of sexual assaults of children, this offence falls at the lesser end" (emphasis original).
- [19] Since that judgment was rendered, the tragic seriousness of sexual offences against children has been emphasized by the Supreme Court of Canada in R v Friesen, 2020 SCC 9, where appropriate sentencing considerations are discussed in detail. Although the circumstances of the sexual offence involved in that case were more egregious than those before us, and the case was decided in the context of legislative amendments that postdated the offence here, the Supreme Court made it clear that the guidance it provides is of general application to the imposition of sentences over the wide spectrum of sexual offences against children (at para 44).
- [20] The court set out a number of important considerations, including these:

- [50] To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important.
- [51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children.
- [56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).
- [60] Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers. Because much sexual violence against children is committed by a family member, the violence is often accompanied by breach of a trust relationship [citation omitted]. Even when a parent or caregiver is not the perpetrator, the sexual violence can still tear apart families or render them dysfunctional [citation omitted].
- [65] The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated with equal respect and dignity [citation omitted]. Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimized [citations omitted].
- [74] It follows from this discussion that sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence. In particular, taking the harmfulness of these offences into account ensures that the sentence fully reflects the "life-altering consequences" that can and often do flow from the sexual violence [citations omitted]. Courts should also weigh these harms in a manner that reflects society's deepening and evolving understanding of their severity [citations omitted].
- [21] These guidelines are relevant to the consideration of the fitness of the appellant's sentence, and the extent to which any error of principle may have impacted that sentence. I turn now to discuss the standard of review.

7.2 Standard of review and the fresh evidence application

- [22] Appellate courts are obliged to give wide latitude to sentencing judges, who are in the best position to determine, having regard to the circumstances, a just and appropriate sentence: *R v Lacasse*, 2015 SCC 64 at para 48; *Friesen* at para 25. Accordingly, appellate intervention is only warranted if (1) the sentence is demonstrably unfit, or (2) the sentencing judge made an error in principle that had an impact on the sentence: *Friesen* at para 26.
- [23] Errors in principle, such as are alleged here, include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors, however, can constitute an error in principle only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably: *Lacasse* at para 49; *Friesen* at para 26.
- [24] Not every error in principle is material. An appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on sentence. If it did not, that is the end of the error in principle analysis, and appellate intervention will be justified only if the sentence is demonstrably unfit: *Lacasse* at para 44; *Friesen* at para 26.
- [25] The appellant's application to adduce fresh evidence is dependent upon a finding of an error in principle. In that event, the appellant submits, the court should take into account factors that were not before the sentencing judge in assessing the fitness of the sentence. These concern, in particular, developments in the appellant's health, the incarceration risks arising from the COVID-19 pandemic, and the lengthy amount of time that the appellant has been subject to bail conditions.
- [26] With these principles in mind, I turn next to consider the errors alleged by the appellant.
- 7.3 Did the judge err in principle in assessing the psychiatric reports and in treating the appellant's continued claims of innocence as an aggravating factor?
- [27] The appellant argues that a convicted person is entitled to maintain his innocence, that this is not a reason to increase the sentence. He says this is particularly so where, as here, he was found not to have had specific sexual intent in relation to the touching. He complains that "lack of insight" was listed as one of three reasons to elevate the sentence beyond the low end of the spectrum that the judge had identified as three months' imprisonment. The reference is to para 95 in the reasons for judgment:
- [95] Here, the offence was at the lesser end of the spectrum of this serious type of offence and the event was relatively brief. Mr. Plehanov was in a position of limited trust, but a position of trust nonetheless. The victim was very young and vulnerable, and his insight into and understanding of his offending seems very limited.
- [Emphasis added.]

- [28] I observe that the judge's comment must be viewed in its proper context, being the judge's review and assessment of the two psychiatric reports in relation to the risk of reoffending. On the basis of his thorough review, the judge concluded that Dr. Kropp's opinion that the appellant was at a moderate risk to reoffend was more accurate and reliable than the opinion of Dr. Levin.
- [29] The appellant asserts that this compounded the problem, because Dr. Kropp's opinion was prepared before Blok J's reasons for judgment on conviction, so that Dr. Kropp was unaware of the finding of a lack of specific sexual intent. But the judge thoroughly reviewed both experts' approaches to the appellant's understanding (or lack thereof) of his offending, noting that both experts acknowledged denial and minimizing of the offence on the appellant's part.
- [30] Moreover, as discussed by Dr. Kropp, it is clear that the appellant's denial was not simply in relation to an element of an offence, but rather implicitly rejected the criminality of his conduct. This included suggesting that X's father "overreacted" to a situation that was really a "misunderstanding", and the denial of wrongdoing altogether. The use of this evidence to assess the risk of reoffending, as opposed to establishing an aggravating factor, was entirely appropriate: see, for example, *R v GM*, 2015 BCCA 165 at paras 28-29.
- [31] In assessing this risk, the judge noted both experts' approaches to the appellant's understanding (or lack thereof) of his offending, preferring that of Dr. Kropp. It was open to him to do so, and this amply supported the judge's conclusion.
- [32] I would not accede to this ground of appeal.

7.4 Did the judge err in principle in relying on findings of fact on sentencing that had not been proven in the evidence?

- [33] This submission is based on the judge's findings at para 75 of his reasons for judgment, as quoted above, that the touching lasted longer than the defence submitted (as little as two instances lasting three seconds each):

From the evidence, I conclude that the touching lasted longer than that, though it was certainly less than a minute and most probably in the range of 20 to 30 seconds. The touching involved both the groin and the buttock area, though mostly the latter.

- [34] The appellant asserts that this finding does not align with the testimony of either of the two witnesses who testified (X and her father), and that an error as to the severity of the offence must necessarily have had an impact on the sentence.
- [35] In order to assess this contention, it is necessary to understand both the context and the evidence.

- [36] Contextually, the judge was responding to the contention of the appellant that the touching was exceptionally limited in duration, to two instances lasting about three seconds each. The judge rejected this contention. It was based on evidence from the father (the appellant did not testify), that he first observed the appellant and X in close proximity for about 20 seconds. This caused him to run to the van, where he observed two incidents, lasting 3-5 seconds.
- [37] But X had testified that the touching lasted "like, 20 seconds", a period of time that she later demonstrated, and which was timed at 12-13 seconds.
- [38] In arriving at his conclusion that the touching was longer than 3-5 seconds, most probably in the range of 20-30 seconds, the judge was not making a specific finding as to timing, but was rejecting the defence contention that it was minimal. In doing so, the judge was entitled to take into account the total period observed by the father, and, of course, X's evidence, in arriving at what he acknowledged was an approximation. As Blok J stated at para 70 of his reasons for judgment on conviction, "The father's evidence, which I accept, helps to establish the overall duration of the events."
- [39] Consequently, his estimate was supported by X's evidence, and was not inconsistent with the father's evidence. It follows that the judge's rejection of the defence contention that the touching was exceedingly brief was indeed supported by the evidence, and cannot be set aside in the absence of palpable and overriding error. As no such error has been demonstrated, I would not accede to this ground of appeal.

7.5 Did the judge err in identifying an inappropriate range of sentence?

- [40] The appellant asserts that the range for the lowest level of offences captured by the relevant Criminal Code provisions, given the wide range of conduct covered, should include non-custodial sentences. It follows, in the appellant's submission that, by situating the low end of the range at three months' imprisonment, the sentencing judge fell into error, essentially establishing a 3-month minimum sentence.
- [41] Justice Blok acknowledged, however, that a suspended sentence can serve the sentencing objectives in an appropriate case. What he concluded was that it would not be appropriate for the appellant's case. I am not persuaded that any error has been identified in the judge's selection of a range from 3 to 12 months for this case, particularly in light of the guidance provided in Friesen, which warns us of the dangers of defining a sentence range based on a hierarchy of physical acts (see paras 145-146), and emphasizes, as noted above, "the imperative of preventing further harm to children".
- [42] In any event, as was pointed out in Friesen at para 37, sentencing ranges and starting points are guidelines, not hard and fast rules, and appellate courts cannot treat the departure from them as an error in principle. As the respondent argues, the real focus of this appeal must be on whether the six-month sentence is inconsistent with the principles that apply to the offence.

[43] I would not accede to this ground of appeal.

7.6 Did the judge err in principle in finding that the appellant was in a position of trust with respect to X?

[44] This is another factor emphasized by the Supreme Court of Canada in Friesen, and is a statutory aggravating factor. The judge said this, as quoted above: "Mr. Plehanov was in a position of limited trust, but a position of trust nonetheless."

[45] The appellant argues that this was wrong in law, and that, as a statutory aggravating factor, being in a position of trust or authority must mean more than simply being the only adult in the immediate area. The appellant points out that there was no evidence that the father had specifically entrusted X to the appellant's care, or had told X to follow the appellant's directions, or that X regarded the appellant as someone whom she trusted. Indeed, the father's evidence was that he did not trust the appellant, which is why he checked on him after he had gone back to the house to deal with the other children.

[46] If this was an error, it is one for which the judge cannot be faulted, as the appellant conceded the point in argument at trial. But as I apprehend it, the judge did not err.

[47] In Friesen, the Supreme Court of Canada referred in paras 125-126 to a "spectrum" of positions of trust, acknowledging that they arise in varied circumstances, and observing that the child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender. The spectrum of relationships of trust is therefore relevant to determining the degree of harm. The court went on to note:

[129] The abuse of a position of trust is also aggravating because it increases the offender's degree of responsibility. An offender who stands in a position of trust in relation to a child owes a duty to protect and care for the child that is not owed by a stranger.

[130] We would thus emphasize that, all other things being equal, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child.

[48] What was the situation here? The appellant was not a stranger, but a friend of the family who had accompanied them to their traditional Easter family gathering, and was about to be given a ride home. He was left as the only adult in a position to supervise a van full of children, while the father went back to the house to deal with other children. He was therefore in a position to "protect and care" for X, as he indeed purported to do in "catching" her when she tripped and fell inside the van. He abused that position by sexually assaulting her. Had he been a stranger, he would not have been able to do so.

- [49] Does it follow that any adult who is not a stranger is necessarily in a position of trust? I do not think it does; it must always depend on the circumstances. The problem identified by the Supreme Court of Canada in *Friesen* is demonstrated here by the evidence of X that she felt betrayed by the appellant, and guilty about getting him into trouble. In the circumstances I have reviewed, I consider that the conclusion that the appellant was in a position of trust was open to the judge, and no error in principle has been established.
- [50] Justice Blok acknowledged that the position of trust was limited in scope and duration. It would thus fall at the lower end of the spectrum discussed in *Friesen*. There was evidence to support this conclusion. It is consistent with the principles expressed in *Friesen*.
- [51] I would not accede to this ground of appeal.

7.7 Did the judge err in failing to consider collateral consequences, applying the wrong standard of law?

- [52] It will be recalled that in discussing aggravating and mitigating factors, the judge stated at para 86 that it was "convenient to mention under this subject the defence argument that Mr. Plehanov's conviction has had negative collateral effects akin to 'humiliation and ruin', a factor mentioned in some sentencing cases." Justice Blok concluded that those collateral effects were little different from those for any other offender in the appellant's situation, and fell far short of "humiliation and ruin".
- [53] The appellant argues that the judge completely disregarded the wide range of collateral consequences that the appellant raised, contrary to the law as discussed in *R v Suter*, 2018 SCC 34. These consequences included the difficulties he was experiencing in relation to his work and his residence, his exacerbated health issues, his mental and physical problems, and the ways in which incarceration would impact him and his mother, who was dependent upon him.
- [54] I do not think that this is a correct analysis of Blok J's approach. It is clear that in the part of the judgment to which the appellant refers, Blok J was responding to, and rejecting, a specific argument raised by the appellant. It does not follow that he ignored the other aspects of the appellant's circumstances upon which the appellant now relies. In fact, Blok J discussed these other aspects in paragraphs 19-24 and 28 of his reasons for judgment. He nevertheless concluded that incarceration was warranted.
- [55] In *Suter*, the Supreme Court of Canada acknowledged that a wide variety of circumstances may be taken in mitigation of a sentence. The context, however, was quite different. There, the offender, who had driven a car onto a patio, killing a two-year-old child, had been abducted by vigilantes who cut off his thumb with pruning shears. Taking this into account together with a number of other significant mitigating factors that reduced the offender's moral blameworthiness, the trial judge imposed a 4-month sentence of imprisonment, with a 30-month driving prohibition. The Court of Appeal for Alberta increased the custodial portion of the sentence to 26 months.

- [56] The Supreme Court considered that both courts had erred, noting that while collateral consequences may be taken into account, they cannot be used to reduce the sentence to a point where it becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender. The court considered that a sentence of 15 to 18 months' imprisonment would have been a fit sentence at the time of sentencing, but as the offender had already served over 10½ months, and had spent 9 months awaiting the court's decision, it would not be in the interests of justice to re-incarcerate him at this time. The sentence was accordingly reduced to time served.
- [57] That is what the appellant invites us to do in this case. But the court found an error of principle there, and I can see none here. We are, of course, dealing with a very different context. In *Suter*, consequences that the court took into account included several that directly impacted the offender's moral culpability. That is not the case here. In *Suter*, the offender had already served more than double the time to which the trial judge had initially sentenced him, which sentence was to be extended. Here, the appellant has served a third of the time to which he was sentenced, in circumstances where it cannot be said, as was the case in *Suter*, that the sentence ultimately imposed was unfit.
- [58] To accept the appellant's argument would, in my view, reduce the sentence to a point where it becomes "disproportionate to the gravity of the offence or the moral blameworthiness of the offender". I would not accede to this ground of appeal.

7.8 Should fresh evidence be admitted?

- [59] As I have found no errors in principle, there is no basis for the application to adduce fresh evidence, with the exception of one aspect: whether the appellant should be given credit for time served before sentencing.

7.9 Should the appellant be credited for pre-sentence time served?

- [60] This was a subject that was not raised before Blok J. The evidence adduced by the appellant indicates that he served the better part of three days in custody before trial. At the generally accepted ratio of 1.5:1 this would equate to 4.5 days of a custodial sentence, which the appellant would round up, seeking credit for 5 days.
- [61] The respondent argues that while it is open to the court to adjust the sentence for pre-trial credit, there was no error, because the matter was not brought to the judge's attention, and the sentence was in any event very lenient.
- [62] This is not, however, a case like *R v Bawa*, 2017 BCCA 387, where this court declined to adjust the sentence for pre-sentence time served. There, this court observed that the trial judge's sentence was very carefully crafted in order to justify a reduction to bring it down to the minimum sentence that could be served in the federal institution. It could not be said, therefore, that the sentencing judge would have made a further adjustment had the judge been aware of the pre-sentence time served.

[63] Here, Blok J was not concerned with matching specific limits, but rather with crafting a fit sentence within an appropriate range. I expect that if the matter of pre-sentence time served had been brought to his attention, Blok J would have allowed credit for it. I would do so here. Given, however, that the days spent in pre-sentence custody did not amount to a full 3 days, I would not "round it up" to 5 days' credit. That would exceed the appropriate ratio. I would reduce the sentence by 4 days.

8.0 DISPOSITION

[64] For these reasons, I would grant leave to appeal, and dismiss the application to adduce fresh evidence except that portion of the evidence dealing with the appellant's pre-sentence time served. I would allow the appeal, but only to the extent of reducing the sentence by 4 days to give credit for that pre-sentence time.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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